

The Special Court for Sierra Leone: Conceptual concerns and alternatives

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1 Background

On 7 July 1999, in Lomé, Togo, the government of Sierra Leone and the Revolutionary United Front (RUF)¹ signed a peace accord to end the nine-year long civil war.² Although the signing of the peace deal was widely welcomed, a provision in the Accord³ granting a blanket amnesty to all combatants and collaborators was widely condemned.⁴ The Sierra Leone Bar Association, Human Rights Watch and Amnesty International, amongst others, condemned the conferring of complete impunity to those responsible for appalling atrocities against civilians.

Despite the granting of amnesty and pardon to the rebels, the atrocities did not cease.⁵ The RUF continued its reign of terror and continued to violate the human rights of the people of Sierra Leone. In May 2000, following weeks of rebel activities, the situation in Freetown degenerated. Innocent civilians demonstrating for peace were shot as

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1 The rebel movement that started the civil war in Sierra Leone in 1991. The Front was led by Corp Foday Sankoh, but is now under the leadership of Issa Sesay.

2 Peace agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone <<http://www.sierra-leone.org/lomeaccord.html>> (accessed 5 February 2001).

3 Art IX of the Accord.

4 For a critique of the amnesty provisions under this Accord, see A Tejan-Cole 'Painful peace — Amnesty under the Lomé Peace Agreement' (1999) 3 *Law, Democracy and Development* 239.

5 'Sierra Leone rebels violating Peace Accord' <<http://www.hrw.org/press/1999/aug/sierra3008.htm>> (accessed 30 August 1999).

they marched towards the residence of the RUF leader, Foday Sankoh.⁶ The outrage that followed led to the arrest of Sankoh and senior members of his movement. The government of Sierra Leone and the United Nations (UN)⁷ were forced to rethink their stance on the amnesty. In a letter to the Secretary General of the UN, dated 12 June 2000, President Ahmed Tejan Kabbah of Sierra Leone requested the establishment of an independent Special Court for dealing with the problems. On 14 August 2000 the UN Security Council passed a resolution requesting the Secretary General to negotiate an agreement with the government of Sierra Leone to create this Special Court.⁸

Following broad consultations, in October 2000 the Secretary General presented his report to the Security Council, annexing an agreement between the UN and the government of Sierra Leone on the establishment of a Special Court for Sierra Leone and enclosing the Draft Statute of the Court.⁹

This contribution strives to examine the Draft Statute of the Special Court for Sierra Leone. The main features of the proposed Court will be identified and compared with other courts namely the International Criminal Tribunal for Rwanda (ICTR), the International Tribunal for the Former Yugoslavia (ICTY) and proposed Extraordinary Chambers in the Courts of Cambodia. Conceptual concerns about the proposed Special Court will be raised. Finally, alternatives to the establishment of the Special Court will be explored.

2 Main features of the proposed Special Court

2.1 Competence

The Court will have powers to prosecute 'persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996'.¹⁰ Both the ICTR and ICTY statutes are wider in scope in that they have powers to prosecute 'persons responsible'.¹¹ The Statute establishing

6 Under the Lomé Agreement, Sankoh was given the status of Vice President and Chairman of the Commission for the Management of Strategic Resources, National Reconstruction and Development.

7 A moral guarantor under the Lomé Agreement, the UN added a caveat to the Accord at the signing stating that the latter was inapplicable to crimes against humanity, genocide, war crimes and other serious violations of international humanitarian law.

8 Resolution 1315 (2000).

9 Report of the Secretary General on the establishment of Special Court for Sierra Leone UN Doc S/2000/915 <<http://www.un.org/Docs/sc/reports/2000/915e.pdf>> (accessed 5 February 2001).

10 Art 1 of the Statute of the Special Court for Sierra Leone (the Statute). This Statute is enclosed in the Report of the Secretary General on the establishment of Special Court for Sierra Leone UN Doc S/2000/915 21 (n 9 above).

11 Art 1 of the Statutes of ICTR and ICTY.

Extraordinary Chambers in the Courts of Cambodia is more restricted. The chamber will only try the 'senior leaders of the Democratic Kampuchea'.¹² In a letter by the Secretary General, the Security Council was requested that the Special Court be given powers to try persons 'who bear the greatest responsibility for the commission of the crimes'. It is submitted that the Secretary General's proposal is broader and includes not only leaders but also others who committed atrocities on a massive scale.

Like the ICTY, the Special Court has a limited geographical jurisdiction; offences must have been committed within Sierra Leone. The ICTR has powers to prosecute offences committed by Rwandan citizens in neighbouring states.¹³ Unlike the Rwanda Tribunal whose seat is located in a neutral country, namely Tanzania, the seat of the Court is expected to be in Freetown. However, provision is made in the Draft Statute for the Court to sit outside Sierra Leone.¹⁴

Further, the jurisdiction of the proposed Special Court is limited also by time. Its jurisdiction begins on 30 November 1996 but owing to the fact that the conflict is still ongoing, there is no cut-off date. The ICTY's jurisdiction is not limited by time, beginning in 1991. The ICTR's jurisdiction is restricted to the period between 1 January 1994 and 31 December 1994.¹⁵ The Extraordinary Chambers in the Courts of Cambodia can prosecute offences committed between 17 April 1975 and 6 January 1979.¹⁶

2.2 Subject matter jurisdiction

The proposed Special Court combines offences under international law with those under national law. The Special Court will have the power to prosecute persons for crimes against humanity, violations of article 3 common to the Geneva Conventions and Additional Protocol II, serious violations of international humanitarian law and some Sierra Leonean domestic law.

Crimes against humanity include widespread or systematic attacks against any civilian population resulting in the following crimes: murder, extermination, enslavement, deportation, imprisonment, torture, rape,

12 Art 1 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea. Cambodia's National Assembly on 2 January 2001 voted to set up a special tribunal, with help from the United Nations, in order to try some of the world's most notorious mass murderers.

13 Art 1 Statute of the International Tribunal for Rwanda.

14 Art 9 of the Agreement between the UN and the government of Sierra Leone.

15 Art 1 Statute of the International Tribunal for Rwanda.

16 Arts 1 and 2 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.

sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence. This also includes persecution on political, racial, ethnic or religious grounds and other inhumane acts.¹⁷ This list follows the enumeration in the statutes of the ICTY and ICTR.¹⁸

The Court will also have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions for the protection of war victims and the Additional Protocol II thereto.¹⁹ These violations include violence to life, health and physical and mental well-being of persons, collective punishments, taking hostages, acts of terrorism, outrages upon personal dignity, pillage, passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court. Threats to commit any of these violations are also included.²⁰

Serious violations of humanitarian law include intentionally directing attacks against the civilian population,²¹ personnel, installations, materials, units or vehicles involved in humanitarian assistance or peacekeeping missions.²² Abduction and forced recruitment of children under the age of fifteen into the armed forces or groups for the purpose of using them to participate actively in hostilities are also offences.²³

Crimes under Sierra Leonean law include offences relating to the abuse of girls²⁴ and offences relating to the wanton destruction of property.²⁵

The Statute of the ICTR covers all of these offences but also includes genocide. As there is no evidence that the atrocities in Sierra Leone were done intending to destroy a national, ethnic, religious or racial group, there was no need to include genocide in the Sierra Leonean Statute.

The Extraordinary Chambers in the Courts of Cambodia will have powers to try crimes and serious violations of Cambodian penal law,

17 Art 2 of the Statute.

18 Both were patterned on Principle VI of the principles of international law recognised in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal. See art 3 ICTR Statute and art 5 ICTY Statute.

19 Art 3 of the Statute. The crimes listed under Additional Protocol II are those under art 4 of the Statute, as the armed conflict in Sierra Leone is considered by the United Nations as 'not of an international character'.

20 Art 4 ICTR Statute.

21 Art 4(a) ICTR Statute.

22 Art 4(b) ICTR Statute.

23 Art 4(c) ICTR Statute.

24 Prevention of Cruelty to Children Act, ch 31 of the Laws of Sierra Leone 1926. Only three specific sections of the act are applicable under the Statute: abusing a girl under 13, contrary to s 6; abusing a girl between 13 and 14 years of age, contrary to s 7, and abducting a girl for immoral purposes, contrary to s 12.

25 Malicious Damage Act 1861. Prosecutions under this act are limited to three sections. Setting fire to dwelling houses contrary to s 2; setting fire to public buildings contrary to s 5, and setting fire to other buildings contrary to s 6.

international humanitarian law and international conventions recognised by Cambodia. These include genocide, crimes against humanity, grave breaches of the Geneva Convention of 12 August 1949 and destruction of cultural property during armed conflict.²⁶

2.3 Concurrent jurisdiction

The Special Court will take precedence over Sierra Leonean courts. It may at any stage request national courts to defer cases to it.²⁷ A similar provision is incorporated into the Statutes of the ICTR and ICTY.²⁸ However, the ICTR Statute differs from that of the ICTY in that it provides primacy over the national courts of all states, while the ICTY has primacy only over national courts.²⁹

Persons tried before the Special Court cannot be subsequently tried by national courts.³⁰ However, the Special Court may subsequently try a person tried by national courts if these national trials were not impartial or independent or the acts for which he was tried were characterised as an ordinary crime.³¹

2.4 Composition and structure

The Court will be a treaty-based, *sui generis* court of mixed jurisdiction and composition.³² It will have three organs: the chambers, comprising two trial chambers, and an Appeals Chamber, the Prosecutor and the Registry.³³ Three judges will serve in each of the trial chambers. The Secretary General of the UN will appoint two of the three judges, the third one being appointed by the government of Sierra Leone. The Appeals Chamber will be composed of five judges, three judges will be appointed by the Secretary General of the UN and the other two appointed by the government of Sierra Leone. These judges will be appointed for a term of four years and will be eligible for reappointment.³⁴

26 n 17 above arts 3, 4, 5, 6 and 7.

27 Art 8(2) of the Statute.

28 Art 9 ICTY Statute and art 8 ICTR Statute. For a critique of the ICTR's jurisdictional primacy, see MH Morris 'The trials of concurrent jurisdiction: The case of Rwanda' (1997) 7 *Duke Journal of Contemporary and International Law* 349.

29 Art 8(2) ICTR Statute and art 9(2) ICTY Statute.

30 Art 9(1) of the Statute.

31 Art 9(2) of the Statute.

32 Unlike the ICTR, which is based on a Resolution of the Security Council and constituted as a subsidiary organ of the UN.

33 Art 11 of the Statute.

34 Art 13(3) of the Statute.

The Rules of Procedure and evidence of the ICTR will apply to the Special Court.³⁵ Appeals will be made to the Appeal Chamber on the grounds of a procedural error, an error on a question of law invalidating the decision and an error of fact occasioning a miscarriage of justice.³⁶

An international prosecutor appointed by the Secretary General, after consultation with the government of Sierra Leone, will lead the investigation and prosecution. He will be assisted by a Sierra Leonean Deputy Prosecutor appointed by the government of Sierra Leone in consultation with the Secretary General.³⁷

The proposed Special Court is modelled on the ICTR in terms of its composition and structure.

2.5 Juveniles

The Special Court will also have jurisdiction over persons who were between the ages of fifteen and eighteen years at the time of the commission of the crime that they are accused of.³⁸ In the trial of a juvenile, the court may constitute a 'Juvenile Chamber' consisting of at least one judge possessing the required qualification and experience in juvenile justice.³⁹ Juveniles may be tried separately from adults and the court must take protective measures to ensure their privacy.

The Statute of the Court does not provide for custodial sentences for juveniles. A juvenile must be released unless his or her safety requires that he or she be placed under close supervision or in a remand home. Detention pending trial shall be a last resort. Emphasis shall be on promoting the rehabilitation and reintegration into society of the juvenile. Children may be ordered to attend vocational, educational and correctional training programmes, approved schools, disarmament demobilisation and reintegration programmes or to care, guidance and counselling programmes organised by child protection agencies.⁴⁰

35 Art 14 of the Statute.

36 Art 20 of the Statute. Art 24 of the ICTR Statute does not include procedural error as a ground of appeal.

37 Art 3(2) of the Agreement between the UN and the government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, UN Doc S/2000/915, 15 (the Agreement).

38 Art 7(1) of the Statute.

39 Art 7(3)(b) of the Statute.

40 Art 7(f) of the Statute.

3 Conceptual concerns about the proposed Special Court

3.1 Primacy of the Special Court

The Statute provides that the Special Court will have concurrent jurisdiction with and primacy over Sierra Leonean courts.⁴¹ The Special Court is intended to be outside the national court system. The implementation of the Statute and the Agreement signed by the Government of Sierra Leone and the United Nations at the national level would also require the Agreement to be incorporated into the national laws of Sierra Leone in accordance with constitutional requirements.⁴²

The Constitution of Sierra Leone⁴³ provides that the judicial system of Sierra Leone consists of the Supreme Court, the Court of Appeal, the High Court and lower and traditional courts that parliament may establish by law.⁴⁴ The judiciary has jurisdiction in all civil, criminal, constitutional and such matters for which parliament may confer jurisdiction by or under an Act of Parliament.⁴⁵ The Supreme Court is the final court of appeal for Sierra Leone. It has original jurisdiction in all matters relating to the interpretation and enforcement of the Constitution and the compatibility of legislation to it.

The Constitution of Sierra Leone clearly states the composition of the various high courts of jurisdiction and the procedure of appointment of its judges. Judges are appointed by the President acting on the advice of the Judicial and Legal Service Commission and subject to approval by parliament.⁴⁶

The drafters of the Constitution of Sierra Leone did not anticipate the setting up of any court having a parallel function to the Special Court within its jurisdiction. The Court does not fit the framework of the present judicial structure. The Constitution clearly spells out the appeals procedure. Appeals from the High Court go to the Court of Appeals.⁴⁷ Appeals from the Court of Appeal go to the Supreme Court, which is the final court of appeal for Sierra Leone. The Special Court will oust the jurisdiction of the Superior Court of Judicature of Sierra Leone and impose a two-tier structure in which its Appeals Chambers will be the final court of appeal.

The Supreme Court in Sierra Leone also has supervisory jurisdiction over all lower courts in Sierra Leone.⁴⁸ As the Supreme Court is the

41 Art 8 of the Statute.

42 n 9 above paras 9 and 10.

43 Act 6 of 1991.

44 Sec 120(4).

45 Sec 120(2).

46 Sec 135(1).

47 In exceptional cases, it may lie directly to the Supreme Court.

48 The Supreme Court has over the years been very reluctant to exercise this jurisdiction. See the case of *The State v Lt Col CH Deen* (2000) *Sierra Leone Law Review* 57.

highest court under the Constitution, it follows that it would have supervisory jurisdiction over the Special Court under national law. This was not the intention of the drafters of the Statute of the Special Court. Their intention was to have a court outside the framework of the Sierra Leonean courts but in compliance with the laws of Sierra Leone.

Incorporating these provisions into the national law of Sierra Leone will require substantial amendments to entrenched provisions of the Constitution of Sierra Leone.⁴⁹ These provisions cannot be amended unless they are passed by Parliament and approved at a referendum by a two-thirds majority. Considering the current precarious state of the security in Sierra Leone and the fact that a substantial part of the country is under rebel control, it seems almost impossible to organise a referendum for this purpose.

In the Australian case of *Polyukovich v The Commonwealth* it was held that a court, when exercising jurisdiction over international crimes, is exercising the judicial power of the international community and not the judicial power of Australia.⁵⁰ In such a case, primacy of such a court would be determined by laws concerning mutual assistance in criminal matters. Although this authority is not binding on the courts in Sierra Leone, it may well be of persuasive authority.

3.2 Draft Statute

The present Draft Statute provides that the Court's powers are limited to national courts and do not extend to courts in other countries. The Court also lacks the power to request the surrender of an accused from any third state and to induce the compliance of its authorities with that request. Considering that a number of suspects are presently in third countries⁵¹ and a number of others could easily travel to such

49 Sec 108 Constitution of Sierra Leone.

50 (1991) 172 *Commonwealth Law Reports* 501. In this case, Ivan Polyukovich was charged with war crimes allegedly committed during World War II. He challenged the constitutional validity of the War Crimes Act, on the basis that the Act purported to operate retrospectively and granted jurisdiction over individuals for alleged crimes having no connection with Australia. The Court held by a four to three majority that s 51(xxix) of the Commonwealth Constitution — the 'external affairs power' — gives the Commonwealth the power to enact laws to implement international treaty obligations incumbent on Australia, and this regardless of the content of the treaty. Under these provisions, the Commonwealth Parliament also has the power to legislate and to implement customary international law. Although the Act is retrospective and operates on people who at the time of the commission of the acts had no connection with Australia, it is still a law with respect to 'external affairs'. The Act is not retrospective in operation because it only criminalises acts which were war crimes under international law as well as 'ordinary' crimes under Australian law at the time they were committed. While there is no obligation at customary international law to prosecute war criminals, there is a right to exercise universal jurisdiction. The War Crimes Act facilitates the exercise of this right.

51 One of the alleged perpetrators, Sam Bockarie, aka Mosquito, is presently in neighbouring Liberia.

countries,⁵² the Statute must request states to co-operate with the Court in the investigation and prosecution of the person accused, and to arrest, detain and extradite such persons. Failing to grant the Special Court these powers will undermine the effectiveness of the Court. Article 28 of the Statute of the ICTR provides that:

States shall co-operate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to a) The identification and location of persons; b) The taking of testimony and the production of evidence; c) The service of documents; d) The arrest or detention of persons; e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.

Article 29 of the Statute of the ICTY contains a similar provision. The proposed Statute of the Special Court for Sierra Leone must be amended to incorporate the powers specified in the ICTR and ICTY Statutes.⁵³

3.3 Temporal jurisdiction

The Draft Statute of the Special Court for Sierra Leone gives the proposed Court jurisdiction over crimes against humanity, violations of article 3 common to the Geneva Conventions and Additional Protocol II thereto, serious violations of international humanitarian law and Sierra Leonean law committed since 30 November 1996. In order to choose this date the framers of the Draft Statute were guided by three considerations. Firstly, the temporal jurisdiction should be reasonably limited in time so that the Prosecutor is not overburdened and the Court overloaded. Secondly, the date should correspond to an event or a new phase of the conflict without necessarily having any political connotations. Thirdly, the date should encompass the most serious crimes committed by persons of all political and military groups and in all geographical areas of the country.⁵⁴

The framers of the Draft Statute rejected the starting date of 23 March 1991 as 'imposing a temporal jurisdiction on the Special Court reaching back to 1991 would create a heavy burden for the prosecution and the Court'.⁵⁵ The effect is the granting of amnesty or pardon for acts committed from 23 March 1991 to October 1996.

52 The rebels control most of the border with Guinea and Liberia and could easily flee into these countries.

53 Human Rights Watch letter to Security Council members dated 31 October 2000.

54 n 9 above, para 25 Report of the Secretary General.

55 n 9 above, para 26 Report of the Secretary General.

Three alternative commencement dates were considered, 30 November 1996,⁵⁶ 25 May 1997⁵⁷ and 6 January 1999.⁵⁸ The first was selected. The date 25 May 1997 had the disadvantage of having political connotations implying that it was aimed at punishing those involved in the 1997 *coup*. The 6 January 1999 saw an offensive specifically targeted on Freetown and would have excluded all crimes before this period in the rural areas and countryside. In view of these disadvantages, 30 November 1996 was selected.

The fact that the jurisdiction of the court is restricted by this time limit might inhibit the successful prosecution of some accused persons. Further, it may result in a number of persons 'most responsible for serious violations of international humanitarian law and Sierra Leonean law' going unpunished. As an example, Human Rights Watch has cited the case of Foday Sankoh, the rebel leader.⁵⁹ Sankoh was arrested in Nigeria in March 1997 on alleged arms charges. He was held under house arrest until he was brought back to Sierra Leone in July 1998. On his return, he was tried for treason, convicted and imprisoned. He was not directly involved in the war during this period. However, there is ample evidence of atrocities committed under his direct command before 1996.⁶⁰ If the scope of the jurisdiction remains the same, the prosecution may have an exacting task establishing his guilt.

Furthermore, the truncated scope of temporal jurisdiction sends the wrong signal. Before 1997, the war had not reached Freetown. The brunt of the atrocities was committed in the provinces. By limiting the date to November 1996, it excludes most crimes committed in the provinces and sends the wrong signal that it only matters when the lives of the people of Freetown are affected.⁶¹

This truncated scope of temporal jurisdiction must be reviewed and the court must be given jurisdiction over all crimes against humanity, war crimes and breaches of Sierra Leonean law committed since 23 March 1991, when the war started.

56 The date of the signing of the Abidjan Peace Accord between the government of Sierra Leone and the RUF. See <<http://www.sierra-leone.org/abidjanaccord.html>> (accessed 5 February 2001).

57 This was the date of the *coup* staged by the Armed Forces Revolutionary Council led by Johnny Paul Koroma overthrowing the elected government of President Tejan Kabbah. For an account of the atrocities committed during this period see A Tejan-Cole, 'Human rights under the Armed Forces Revolutionary Council (AFRC) in Sierra Leone: A catalogue of abuse' (1998) 10 *African Journal of International and Comparative Law* 481.

58 The date the former soldiers of the Republic of Sierra Leone military forces and the RUF launched an attack on Freetown.

59 Human Rights Watch letter to Security Council members dated 31 October 2000.

60 In the treason trial of Sankoh, several former RUF combatants gave evidence about atrocities they committed (or witnessed) on the command or orders of Sankoh.

61 This further exacerbates the tensions existing since the colonial period between the then Colony, now the Western Area, and the Provinces.

3.4 Prosecution of children

An account of the atrocities in Sierra Leone shows clearly that children have committed some of the worst crimes known to mankind.⁶² Yet some of these children are themselves victims, abducted from their families and drugged by adults before using them as cannon fodder by sending them to the war front.⁶³

The issue of prosecuting children raises difficult moral dilemmas and has created a chasm between the people of Sierra Leone. There are two main opinions. The first suggests that child combatants between the ages of fifteen and eighteen years must face a Truth and Reconciliation Commission. Thus, they can tell their stories without due process of law, repent and be forgivingly rehabilitated in order to heal the wounds of their horrific childhood trauma. This is endorsed by amongst others UNICEF and a number of local human rights organisations, including child rights monitoring groups.

The second view requires that child combatants between fifteen and eighteen years be made to go through the judicial process of accountability without punishment in a court of law providing all internationally recognised guarantees of juvenile justice.⁶⁴ In a letter to the President and members of the Security Council, dated 10 December 2000, civil society groups in Sierra Leone stated, 'We believe that children between the ages of fifteen and eighteen must be accountable for offences they committed. We urge that the statute of the Court does not specifically prevent the trial of children but the decision whether to prosecute children be left to the prosecutor to determine on a case-by-case basis.'⁶⁵ This is in accordance with existing international and Sierra Leonean law. The Convention on the Rights of the Child⁶⁶ and the International Covenant on Civil and Political Rights make provision for juveniles to be prosecuted. Three other non-binding texts, the UN Standard Minimum Rules for the Administration of Juvenile Justice 1985,⁶⁷ the UN Rules for the Protection of Juveniles Deprived of their Liberty 1990, and the UN

62 See <<http://www.bbc.co.uk/worldservice/people/features/childrenrights/childrenofconflict/soldier.html>> (accessed 5 February 2001).

63 Amnesty International press release, AFR 51/038/2000, of 16 June 2000, 'Sierra Leone: War crimes against children continue.'

64 The government of Sierra Leone and the UN Secretary General in his report supported this view.

65 The Bar Association, Campaign for Good Governance and the Sierra Leone Association of Journalists. See <<http://slcgg.com/unletter.htm>> (accessed 5 February 2001).

66 See art 37 and 40. Sierra Leone ratified the Convention in 1996.

67 The Beijing Rules adopted by the UN General Assembly Resolution 40/33 of 29 November 1985.

Guidelines for the Prevention of Juvenile Delinquency⁶⁸ provide rules for the trial of juveniles.⁶⁹

The law of Sierra Leone provides for children and young persons to be tried in the High Court of Sierra Leone for capital offences including murder.⁷⁰ All summary offences are to be tried by the juvenile courts, except trials involving adults and juveniles jointly charged. Section 210 of the Criminal Procedure Act,⁷¹ which regulates criminal trials in Sierra Leone, provides that children and young persons accused of criminal offences shall be apprehended and tried in accordance with the provisions of the Children and Young Persons Act.⁷²

Most of the guarantees provided by the Act have been incorporated into the proposed Statute of the Special Court. Art 7(2) of the Statute provides for a juvenile to be treated 'with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society'. This ensures that a child combatant, if tried and found guilty, will not be given a custodial sentence but will be committed to an accredited rehabilitation centre for his reform and development. In the words of the Sierra Leonean lawyer Mohamed Pa-Momo Fofanah,⁷³

trying children between 15 and 18 years of age without punishing them in the strict sense of the word strengthens the due process of law, decimates impunity without trial which the Lomé Accord of 7 July 1999 legitimises and discourages juvenile criminality especially as certain child combatants, eg 'small commandos' between that age bracket, are known to have 'knowingly' committed horrendous felonies with or without the influence of drugs.

This debate may well be academic. The proposed court will have the power to try persons 'who bear the greatest responsibility for the commission of the crimes'. This definition is very restricted. It is doubtful whether any child will fall within this definition.

68 The Riyadh Guidelines adopted by the UN General Assembly Resolution 45/112 of 14 December 1990.

69 An exception is art 26 of the Rome Statute establishing an International Criminal Court which provides that the Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

70 The Children and Young Persons Act distinguishes the two groups. 'Young person' is defined as a person between the ages of 14 and 17 years and a 'child' means a person under the age of 14 years.

71 Act 32 of 1965.

72 Ch 44 of the Laws of Sierra Leone 1960.

73 A Tejan-Cole & MP Fofanah (2001) 'Child combatants and the proposed Special Court' (unpublished article).

3.5 The link between the Truth and Reconciliation Commission and the Special Court

In January 2000 the Sierra Leone Parliament enacted the Truth and Reconciliation Commission (TRC) Act.⁷⁴ The TRC's objective is 'to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone' from 1991 to 1999, to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.⁷⁵

The TRC and the proposed Special Court will both play an important role in promoting justice, accountability and reconciliation in Sierra Leone. However, the roles of these institutions will overlap. It is therefore imperative that the relationship between these institutions be clearly and carefully considered. The Security Council must mandate a co-operative relationship between these two institutions in the Statute establishing the Special Court. Without such co-operation, the two institutions may squander very limited resources and waste substantial time.

By every indication only a limited number of perpetrators will be tried by the proposed Special Court.⁷⁶ The TRC will address those not tried by the Court. It will afford victims an opportunity to tell their stories and have their sufferings acknowledged and give perpetrators an opportunity to explain their side of the story and seek repentance.

The TRC and the Special Court can also complement each other by jointly engaging in public awareness and educational campaigns, collaborating in providing witness protection services and in collecting evidence.

3.6 'Sierra Leonean judges'

The Statute of the proposed Court and the Agreement provide for each chamber of the court to be composed of two judges appointed by the Secretary General and one 'Sierra Leonean judge'. At the request of the government of Sierra Leone the phrase 'Sierra Leonean' was replaced by 'judges appointed by the government of Sierra Leone'. While this does not preclude the appointment of a Sierra Leonean judge, it creates the possibility that Sierra Leoneans may not play any adjudicating role in this process.

The Special Court presents a unique opportunity to develop the judiciary and the legal system in Sierra Leone. Limiting the role Sierra

74 Act 4 of 2000. Provision for the establishment of the Commission was made in the Lomé Peace Agreement.

75 Sec 6. The Commission has not yet been established.

76 Recent estimates suggest that not more than 24 persons will be tried. If the tribunals in Rwanda and former Yugoslavia are good precedents, they confirm the accuracy of this statistic.

Leoneans play in the process may alienate the citizens of Sierra Leone from the process. The participation of Sierra Leoneans, judges as well as lawyers, in the proposed court will lead to more tangible justice for the people of Sierra Leone and help strengthen the judicial institutions of the country. The tribunal will certainly not be 'mixed' if it lacks a Sierra Leonean component. The present system, consisting of two judges appointed by the Secretary General and one Sierra Leonean judge, ensures that the system will be broad based, fair and will not be politically manipulated. Long after the trials, those Sierra Leonean judges who gained from their experiences in the Court will continue to apply international law in their jurisdiction. Foreign judges will also benefit from the insights of Sierra Leonean judges as regards the application of Sierra Leone law.

3.7 Time

The need for justice in Sierra Leone is urgent and expectations are high. Recent estimates suggest that the Special Court will at the earliest be operational in about two years. The UN bureaucracy has been procrastinating. The Security Council resolution was adopted in August. The Secretary General's report was produced in October 2000. It took the Security Council until December 2000 to forward its response to the Secretary General's report. It may take a couple of months more before the final draft of the statute is adopted. With every passing day, material evidence continues to disappear.

The court will serve little or no effect if held long after the war. Swift trials conducted immediately after the war and which capture public attention will be more effective than protracted symbolic trials held long after the war.⁷⁷

3.8 Detention of alleged perpetrators

Another significant reason why the court must be established soon is that since May 2000 the top echelons of the RUF, including Foday Sankoh, have been detained by the government of Sierra Leone under the emergency provisions of the Constitution. These provisions give the President sweeping powers of arrest and detention. The government cannot release these RUF members but as the Special Court has not yet been set up they cannot be brought before it. One suggestion has been for them to be tried for some minor offences under domestic law

77 S Landsman 'Retroactive trials and justice' (1998) 96 *Michigan Law Review* 1456 1468.

pending the establishment of the Special Court.⁷⁸ This may not only be a waste of time and money but it may provoke a huge outcry from a largely illiterate population who will be thinking that Sankoh has been let loose lightly. The long and somewhat irregular detention period may well become an issue before the Special Court.

It is trite law that the seriousness of the offence cannot justify a prolonged detention without charge.⁷⁹ States have an obligation under international law to bring suspects to trial as soon as possible. No one should be subject to arbitrary arrest and detention in contravention of article 9 of the Universal Declaration and article 9 of the ICCPR. All prisoners should be treated humanely in accordance with article 10 of the ICCPR. The UN Standard Minimum Rules for the Treatment of Prisoners, the UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, and articles 7 and 15 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment all condemn prolonged detention.

3.9 Definition of the crime of recruitment of child soldiers

The Statute defines the crime of recruitment of child soldiers as 'abduction and forced recruitment of children under the age of fifteen years into armed forces or groups for the purpose of using them to participate actively in hostilities'.⁸⁰

Protocol II of the Geneva Conventions of 1949 prohibits any recruitment by armed forces or groups, or participation of children in hostilities who have not attained the age of fifteen years.⁸¹ The Convention on the Rights of the Child urges state parties to 'take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities'.⁸² It further provides that 'state parties

78 There is some doubt as to whether they could be tried under domestic law in view of the amnesty granted under the Lomé Peace Agreement. This writer subscribes to the view that amnesty was unconstitutional under Sierra Leone law and as such they could be tried. Further, as was established in the Privy Council case of *Attorney-General of Trinidad and Tobago v Lennox Phillip* (No 2) (1995), 1 AC 396, an amnesty may expunge past offences but it cannot be used to dispense with future lawbreaking. Sankoh and his ilk cannot rely on the 1999 amnesty for any criminal act committed after the amnesty.

79 See *Republic v Sudi Adaka Sulaimana* (1996) 1 *Commonwealth Human Rights Law Digest* 106.

80 Art 4(c) of the Statute.

81 Art 4(3)(c) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 United Nations Treaty Series 609, entered into force 7 December 1978.

82 Art 38(2) of the Convention on the Rights of the Child GA Res 44/25, Annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force 2 September 1990 (Children Convention).

shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, state parties shall endeavour to give priority to those who are oldest.⁸³

The Rome Statute of the International Criminal Court defines the conscription and enlistment of children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities as a war crime.⁸⁴

According to Human Rights Watch, the definition contained in the proposed Statute 'considerably narrows the well-established prohibition on any recruitment or use of children'.⁸⁵ Any recruitment of children, regardless of the purpose of their recruitment, must be made a war crime.

4 Possible alternatives

4.1 An international tribunal for Sierra Leone?

No one so far has seriously advocated the establishment of an international tribunal for Sierra Leone. The problems of the existing tribunals have been well documented. Both the ICTY and ICTR have been criticised primarily for their weak enforcement powers, apparent slow progress in starting trials and bureaucracy-laden institutions.⁸⁶

The actions of the ICTY's have been described as counterproductive because the indictments have hardened the Serbs' opposition to the peace treaty. Most Bosnian Serbs also complain that the tribunal is biased because it has selectively prosecuted more Serbs than Croats or Moslems, even though all sides committed atrocities.

On the other hand, the ICTR has been accused of administrative incompetence and mishandling of funds. In February 1997, a UN investigative panel released a report concluding that the ICTR had been plagued with bureaucratic waste and mismanagement since its establishment in 1994. Critics have also focused on the ICTR's mandate, which they say is too narrow. They argue that the ICTR will prove to be less effective than hoped because its scope is limited to violations within Rwanda itself and it is allowed to investigate abuses that occurred in the 1994 calendar year only. The ICTR has also not established a positive working relationship with the current Rwandan government.

83 Art 38(2) and (3) Children Convention.

84 Art 8(2)(b)(xxvi) of the Rome Statute of the International Criminal Court, UN Doc A/CONF 183/9 (1998).

85 Human Rights Watch letter to Security Council members dated 31 October 2000.

86 K Roth 'International injustice: The tragedy of Sierra Leone' (2000) *Wall Street Journal* (Europe).

Neither tribunal has yet indicated that it is able to act as a deterrent to war crimes in the future. Neither Karadzic nor Mladic, for example, was influenced by the ICTY's war crimes indictments, and they continued to incite and oversee atrocities during the civil war. The 'fear of apprehension' has not been a deterrent.

4.2 National trials

Similarly, the argument for a national trial has not been forcefully canvassed. The judicial system is largely decimated as a result of the war. It is only functional in Freetown and lacks the enormous human and financial resources required to undertake such a trial. Further, most people have been affected by the war. Some have had their houses burnt, others assaulted and most have lost relatives as a result of atrocities committed by one or other of the fighting forces. Some writers have suggested that to ensure that the trial is 'broad-based, unbiased, and fair' the Sierra Leonean judiciary must of necessity play a limited role.⁸⁷ National trials may further polarise the society and do more harm than good. In the words of Alvarez, 'sham trials by insincere regimes implicated in the very atrocities adjudicated or political show trials by successor regimes bent on vengeance instead of justice are not likely to advance the rule of law at either the national or international levels.'⁸⁸

It has been argued that international tribunals, as opposed to national trials, more readily fulfill victims' expectations for the 'highest form of justice'⁸⁹ and are better at upholding the 'rule of international law'.⁹⁰ Alvarez further states as follows:⁹¹

By comparison to national courts, international tribunals are perceived to enjoy certain advantages: they are less destabilizing to fragile governments, are less likely to cede to short-term objectives of national politics, can count on the expertise of jurists who are better qualified and able to progressively develop international law, are more impartial than proceedings adjudicated by national judges 'caught up in the milieu which is the subject of the trials', are more likely to be respected by national authorities, can investigate crimes with ramifications in many states more easily and can render more uniform justice.

87 As above.

88 JE Alvarez 'Crimes of states/crimes of hate: Lessons from Rwanda' (1999) 24 *Yale Journal of International Law* 365-370.

89 R Goldstone 'The United Nations' War Crimes Tribunals: An assessment' (1997) 12 *Connecticut Journal of International Law* 227.

90 A Cassese 'On the current trends towards criminal prosecution and punishment of breaches of international humanitarian law' (1998) 9 *European Journal of International Law* 2-17 <http://www3.oup.co.uk/ejilaw/hdb/Volume_09/Issue_01> (accessed 5 February 2001).

91 Alvarez (n 88 above) 375, summarising the arguments of Goldstone and Cassese on the advantages of an international tribunal.

4.3 National hybrid system

A third possible alternative has received very little attention. Like the proposed Special Court, it blends the national and international legal systems. But unlike the proposed Special Court, it will be based under the Sierra Leonean system. The Constitution of Sierra Leone provides that a person shall be qualified for appointment to the Superior Court of Judicature if he is entitled to practise as counsel in a court having unlimited jurisdiction in civil and criminal matters in Sierra Leone or in any other country having a system of law analogous to that of Sierra Leone.⁹² Thus, judges from other Commonwealth and common law countries are eligible to be appointed to serve as judges in the superior courts in Sierra Leone. This alternative enables judges from the Commonwealth and common law nations not directly involved in the war⁹³ to be appointed as judges in Sierra Leonean courts. This will address the fears of unfairness and bias. In the Court of Appeal, which is normally composed of a panel of three judges, two non-Sierra Leonean judges would sit with a Sierra Leonean judge. The presiding judge would preferably be one of the foreign judges. In the Supreme Court, with a normal panel of five judges, at least three judges will not be Sierra Leoneans.

Such a court will also be in a position to try the same crimes as stated in the statute of the proposed Special Court. Crimes provided for in the statute are all crimes considered to have had the character of customary international law at the time of the alleged commission of the crime.⁹⁴ Common article 3 of the Geneva Conventions and article 4 of the Additional Protocol II are part of international customary law. The Statute of the International Criminal Court also recognises these crimes as war crimes.⁹⁵ Attacks against civilians and persons *hors de combat* have long been recognised as violations of customary international law.

This system will address most of the concerns raised with the special court. The legacy will be lasting. The improvements to the legal system will be utilised long after the trials are over. However, this system also raises some concerns. The financial costs are enormous. The government of Sierra Leone will not be able to meet all the costs. It is not very likely that the national courts of Sierra Leone will receive the funding required

92 In the 1960s and 1970s a number of judges from Commonwealth countries, including Sri Lanka and India, served in the Superior Courts of Judicature in Sierra Leone. In the 1980s and 1990s, Nigerian and Ghanaian judges were appointed based on this provision. Presently, a Ghanaian judge sits in the Supreme Court and a Nigerian in the Court of Appeal.

93 Britain and Nigeria have been actively involved in the war on the side of the government and for this reason ought to be excluded.

94 n 9 above para 12.

95 Sierra Leone ratified the statute this year. The statute is not yet in force.

to overhaul the legal system. The law courts need refurbishing estimated at US\$1,5 million; building new courts or renovating the present buildings is estimated at US\$5,8 million and the estimated costs of renovating one prison is US\$600 000.⁹⁶

Further, although it is proposed that the majority of judges in each court should be foreigners, it is doubtful whether all the parties to the conflict would consider this unbiased. The judges, whether Sierra Leonean or not, are appointed by the President acting on the advice of the Judicial and Legal Service Commission and subject to approval by parliament.⁹⁷ Such control may send the wrong signals.

Such a court may sit within or outside of Sierra Leone. There is no provision in the laws of Sierra Leone for a national court to sit outside Sierra Leone. Considering the precarious security situation in Sierra Leone, any outbreak of violence would lead to the annulment of trials.

Further, most of the Conventions which have been ratified by Sierra Leone are not applicable within the country as parliament has not enacted or adopted them.⁹⁸ The customary nature of some of the crimes mentioned in the statute is questionable.

The Extraordinary Chambers in the Courts of Cambodia adopt a similar model. However, unlike this proposal, Cambodians are in the majority in all courts. The Cambodian system will be composed of five judges, including the president of court, three of whom will be Cambodian and two foreign. The Appeals Court will comprise seven judges, of whom four shall be Cambodian and three foreign. The Extraordinary Chambers will be established within the existing structure of the Cambodian judicial system. There are two co-prosecutors, one Cambodian and the other a foreign judge.

5 Conclusion

Most Sierra Leoneans have heard about the Special Court but know little or nothing about its particulars. However, the prospect of the Special Court continues to arouse a great deal of anxiety among many in the human rights and NGO community. While the concept of the court is generally embraced, some Sierra Leoneans fear that the prospect of the Special Court may create a disincentive for rebels to leave the bush. Others are resentful about the fact that millions of dollars will be spent on trying the accused persons, while the victims of the war live in abject poverty.

⁹⁶ n 9 above paras 60 and 62.

⁹⁷ Sec 135(1) of the constitution.

⁹⁸ Sec 40 of the Constitution requires the parliament to enact or adopt by resolution any treaty, agreement or Convention executed by the President that, *inter alia*, alters the law of Sierra Leone.

Furthermore, many question the timing of the trials while the war is ongoing.⁹⁹ Others question whether it is a serious attempt by the UN to address impunity. One speaker even suggested that the Special Court is another means for enriching UN staff and paying lip service to justice. This coincides with the general public's perception about the UN Mission in Sierra Leone.¹⁰⁰

There is still a lot of misinformation about the Special Court. It is absolutely essential that the UN and the government of Sierra Leone implement the right system that will address the concerns of the people and not a system imported from another country. With the right model and an effective public information campaign, these qualms will be minimised and the Court's prospects of providing justice for the victims greatly enhanced.

⁹⁹ At a panel discussion organised by the Law Society at Fourah Bay College on 13 December 2000 on the theme 'Efficacy of War Crimes Tribunal *vis-à-vis* the sustenance of peace in post-war Sierra Leone', several speakers including Dr Dennis Bright and Osman Kamara, MP questioned the timing of the establishment of the Special Court in view of the ongoing war.

¹⁰⁰ Comments by callers to the weekly local radio talk show, Security Talk, broadcast on FM 98.1 on Sundays at 1 pm.